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No. 103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

CHARLES W. BAKER, ET AL.,

Appellants,

v.

JOE C. CARR, ET AL.,

Appellees

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLANTS

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLANTS

Opinion Below

The Opinion of the District Court of the United States for the District of Tennessee is reported at 179 F. Supp. 824 (M.D. Tenn. 1959).

Jurisdiction

This suit was brought under 28 U.S.C. § 1343 (3) and (4) (62 Stat. 932, as amended); 42 U.S.C. § 1983 and § 1988 (17 Stat. 13 and 16 Stat. 144, as amended); and 28 U.S.C. § 2201-2202 (62 Stat. 964, as amended 72 Stat. 349), seeking a declaratory judgment as well as an interlocutory and permanent injunction restraining the enforcement, operation, and execution of an Act of Apportionment, Public Acts of Tennessee, Ch.

122 (1901), now Tenn. Code Ann. § 3-101 through 3-107 (1956).

The opinion of the District Court of the United States for the Middle District of Tennessee was rendered on a motion to dismiss, without the taking of any testimony, on December 21, 1959, and an order was entered by the district court on February 4, 1960. Notice of appeal was filed on March 27, 1960. The jurisdictional statement was filed in this Court on May 26, 1960, and the Court noted probable jurisdiction on November 21, 1960, 29 LW 3152. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253 (62 Stat. 926).

Statutes and Constitutional Provisions Involved

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956), which is set forth in Appendix A, infra at page 50, 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. 2201, 2202, which are set forth in Appendix B, infra at page 54. The UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2, which is set forth in Appendix C, infra at page 56.

TENN. CONST., art. I § 5 (1870):

Sec. 5. *Elections to be free and equal, right of suffrage declared.*—That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction.

TENN. CONST., art. II, §§ 3, 4, 5, 6, and 11 (1870):

Sec. 3. *Legislative authority; term of office.*—The legislative authority of this state shall be vested in a general assembly which shall consist of a senate and house of representatives, both dependent on the people; who shall hold their offices for two years from the day of the general election.

Sec. 4. *Census.*—An enumeration of the qualified voters, and an apportionment of the representatives in the general assembly, shall be made in the year one thousand eight hundred and seventy-one, and within every subsequent term of ten years.

Sec. 5. *Apportionment of representatives.*—The number of representatives shall, at the several periods of making the enumeration, be apportioned among the several counties or districts, according to the number of qualified voters in each; and shall not exceed seventy-five, until the population of the state shall be one million and a half, and shall never exceed ninety-nine; Provided, That any county having two-thirds of the ratio shall be entitled to one member.

Sec. 6. *Apportionment of senators.*—The number of senators shall, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each, and shall not exceed one-third the number of representatives. In apportioning the senators among the different counties, the fraction that may be lost by any county or counties, in the apportionment of members to the house of representatives, shall be made up to such county or counties in the senate, as near as may be practicable. When a district is composed of two or more counties, they shall be

adjoining; and no county shall be divided in forming a district.

Sec. 11. *Powers of each house; quorum; adjournments from day to day.*—The senate and house of representatives, when assembled, shall each choose a speaker and its other officers; be judges of the qualifications and election of its members, and sit upon its own adjournments from day to day. Not less than two-thirds of all the members to which each house shall be entitled shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, by law, to compel the attendance of absent members.

Questions Presented

1. Whether the Tennessee statute, which in 1901 affirmatively created an inequality of voting rights, through an unlawful apportionment of legislative representation, continued and worsened by purposeful and systematic legislative refusal to obey the decennial reapportionment requirement of the state constitution and the state constitutional guarantee of free and equal elections, is a denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Whether a District Court of the United States may grant relief where the District Court has found (a) that the Tennessee statute unequally apportions legislative representation in violation of the state constitutional mandate requiring equal apportionment of legislative seats according to the number of qualified voters of the several counties and districts of the state, (b) that in consequence the state legislature is guilty of a clear violation of the state constitution and of

the rights of the plaintiff voters under the federal and state constitutions, and (c) that the evil is a serious one which should be corrected without delay.

STATEMENT OF THE CASE

This action was brought in 1959 by appellants who were the plaintiffs below, qualified voters and taxpayers in the State of Tennessee, against state election and other officials (appellees) in their representative capacities, under the federal Civil Rights Acts and the federal Declaratory Judgment Act,[1] to invalidate a statute which denies the equality in voting rights guaranteed to appellants by the Constitution of Tennessee[2] and by the equal protection clause of the Fourteenth Amendment to the Federal Constitution. Since the judgment below was entered upon a motion to dismiss by the appellees without the hearing of testimony, on this appeal the facts well pleaded by appellants are taken to be true.[3]

The Tennessee Constitutional Formula

Under the Tennessee Constitution, the legislature (General Assembly) is comprised of a Senate and a House of Representatives. There is a maximum number of members (reached in 1880), ninety-nine in the House and thirty-three in the Senate, but membership in both houses is proportioned to the qualified voting

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[1] The Civil Rights statutes are 17 Stat. 13 (1871), as amended, 42 U.S.C. § 1983 (1952); 16 Stat. 144 (1870) as amended, 42 U.S.C. § 1988 (1952); 62 Stat. 932 (1944) as amended, 28 U.S.C. § 1343 (3) and (4) (1957). The declaratory judgment statute is 62 Stat. 964 as amended 72 Stat. 349, 28 U.S.C. 2201, 2202.

[2] TENN. CONST., art I, § 5 (1870).

[3] *Gomillion* v. *Lightfoot*, 364 U.S. 339.

population.[4] The seats in the Senate and House are to be apportioned according to the qualified voters among the counties (there are 95) or districts (comprising one or more whole adjoining counties), provided that in the House a county having two-thirds of the voting population needed to qualify for one seat shall be entitled to one seat.[5]

In declaring the right of suffrage, the state constitution provides that "elections shall be free and equal",[6] and it is required that there shall be an enumeration of qualified voters and an apportionment every ten years following the year 1871 of representatives and senators in the General Assembly by counties or districts according to the number of qualified voters.[7] Thus the constitutional formula guarantees equality of voting rights through equality of representation as nearly as is practicable.

The Deterioration of Voting Rights

The last Act reapportioning the number of legislators was passed in 1901.[8] This Act was in violation of law then because an enumeration of qualified voters was not made and the actual number of qualified

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[4] Art. II, sec. 3 of the Tennessee Constitution specifies that both houses shall be "dependent upon the people".

[5] TENN. CONST., art II, Secs. 3, 4, and 6 (1870). In apportioning seats for the Senate the fraction that may be lost by any counties in the apportionment of members to the House shall be made up to such counties as near as may be practicable. Section 6.

[6] TENN. CONST., art I, § 5 (1870)

[7] TENN. CONST., art II, §§ 4, 5 and 6 (1870)

[8] Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956).

voters in the state was ignored.[9] As a result, eleven counties were immediately under-represented.[10]

Furthermore, after 1911, the Act of 1901 was no longer a constitutional basis for the election of representatives and senators because a new enumeration of qualified voters as well as a new apportionment of representation in the General Assembly was required in 1911 and every ten years thereafter.[11]

Each and every Tennessee legislature since 1901, including the legislature in office at the time the complaint in this case was filed, has failed to reapportion the number of legislators required to be elected from the several counties and districts of the state. Systematically and purposefully, the General Assemblies elected since 1901 have defeated all bills proposing reapportionment of the legislature.[12]

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[9] It was proposed in the legislature that apparently not adopted that the federal census of 1900 be used. An exhaustive search of the records in the office of the Tennessee Secretary of State and of the State Archives has failed to produce any report concerning an enumeration of voters in 1901. Intervening complaint of Ben West, exhibit 2, R 138-139.

[10] R 232.

[11] Tenn. Const., art II, §§ 4, 5 and 6 (1870).

[12] See "A Documented Survey of Legislative Apportionment in Tennessee, 1870-1957" [the printed record erroneously labels it to 1929], exhibit 2, intervening complaint of Ben West, R 126, 144-169. As plainly stated by Governor Frank G. Clement in a 1955 message to the Tennessee legislature:

> "Our Constitution provides that the State shall be redistricted for the purposes of determining proper representation every ten years. This provision of our basic law has not been obeyed for nearly 50 years—since, in fact, the year 1901 [erroneously 1907 in text], when the last reapportionment was accomplished. The districts set up at that time are still in effect, except for

During the period from 1900 to 1950, the counties in which appellants reside experienced a substantial growth in population. This growth has meant that Davidson County, which had 33,311 in its voting population in 1900, by 1950 had 211,930 in its voting population. Likewise, in terms of voting population, by 1950 Shelby County had grown from 43,843 to 312,345; Knox County had grown from 19,049 to 140,559; Montgomery County had grown from 8,712 to 26,284; and Hamilton County had grown from 16,892 to 131,971.[13]

As a result of the refusal of succeeding Tennessee General Assemblies to provide for an enumeration of qualified voters in the state every ten years since 1901, and to apportion the legislative representation according to the number of qualified voters in the several counties or districts, by 1950 some 23 Tennessee counties possessed 25 direct representatives when their total voting population actually entitled them to only 2 direct representatives.[14] In contrast, ten counties,

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minor changes not following any logical pattern, and, in some cases, there are glaring inequalities. . . ." R 155-156.

Appellants advised each member of the 81-t General Assembly shortly after it convened in January, 1959, of the intention to bring the instant court action, expressing the hope that that legislature, now defunct, would take appropriate action before its adjournment. R 14.

[13] R 236, Amendment and supplement to the intervening petition of Ben West, exhibit 7. These counties have been experiencing an even more rapid rate of growth in the last ten years. The 1960 census, completed after this action was commenced, shows in a table being prepared for publication and made available by the U. S. Bureau of the Census, for Davidson County 242,933, Shelby County 359,532, Knox County 151,999, Montgomery County 30,419, and Hamilton County 142,979, voting population.

[14] Ibid, exhibit 4, R 231

including those where the appellants reside, had but 20 direct representatives, although actually entitled in 1950 to a total of 45 direct representatives under the state constitutional formula.[15]

By 1950, assuming all 33 state senators were apportioned on the basis of the Tennessee total voting population, each Tennessee senatorial district would have represented 59,956 voters.[16] Nevertheless at that time only one senator each represented the 30th, 32nd, and 33rd senatorial districts (composed almost entirely of Shelby County) with 109,430 qualified voters per senator in each district; the 16th and 17th senatorial districts (composed of Davidson County) with 105,965 qualified voters per senator in each; the 5th and 6th senatorial districts (predominantly Knox County) with 102,726 qualified voters per senator in each; and the 8th senatorial district (composed of Hamilton County) with 131,871 qualified voters per senator.[17] On the other hand, 19 of the 33 senatorial districts each had less than 90% of the approximately 60,000 standard for voting population, in fact six of the districts each represented less than 30,000 in voting population and another seven represented less than 40,000 voting population each.[18]

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[15] Ibid, exhibit 5, R 234.

[16] Id., exhibit 7, R 240. In 1950, the total Tennessee voting population was 1,978,548. This figure divided by 33, the number of state senators, equals 59,956. (The 1960 total voting population, per the U.S. Census Bureau information being prepared for publication, is 2,092,891.)

[17] Ibid, R 236-240.

[18] Ibid.

Results of the Inequality

The inequality and unfairness in perpetuating voting and representation under the challenged 1901 Act is further illustrated by comparing its provisions with the representation which would be required in the case of four of the most populous counties, using 1950 voting population figures.

Under the Act of 1901, Shelby County, for example, was given and presently has only 7 members in the Tennessee House of Representatives and 2 direct and one floterial senator in the state Senate.[19] Using the 1950 federal census of voting population,[20] Shelby County, where appellant Baker resides, was entitled to 15 members in the House of Representatives, and 5 Senators.[21] Similarly, Davidson County, where appellant West resides, was entitled under 1950 voting population figures to 10 representatives and 3 senators, but was given in 1901 and now has 6 representatives and 2 senators;[22] Knox County, where appellant

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[19] Appendix A, post, Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901) now Tenn. Code Ann. § 3-101 to 3-107 (1956). (Also R 67-71). A direct senator or representative is elected by and represents the voters of a single county. A floterial or floaterial senator or representative is elected by and represents the voters of two or more counties. Actually, the 1901 Act was incipiently deficient since it gave Shelby County (among other counties) one less direct representative than the county was entitled to in disregard of the voting population (as shown by the 1900 federal census) and the state constitutional requirement. Art. II, sec. 5, R 232.

[20] U.S. Census of Population: 1950. Vol. II, Characteristics of the Population, Part 42, Tennessee, Chapter B, Table 42, pp. 92-97.

[21] Amendment and supplement to the intervening petition of Ben West, exhibit 5, R 234; Exhibit B to complaint of Baker et al., R. 22.

[22] Ibid.

Smith resides, was entitled to 7 representatives and 2 senators in 1950, but was given and now has 3 representatives and 1 senator;[23] Hamilton County, where appellant McGanley resides, was entitled to 6 representatives and 2 senators in 1950, but was given and now has 3 representatives and 1 senator.[24]

The significant state population changes since 1901 and the failure and refusal of the various Tennessee legislatures to reapportion since that date have reduced the equality of appellants' votes to a fraction of the effectiveness of those of voters residing in other state counties and electoral districts. Other voters in some of these counties and districts have a full vote, while still others of a selected minority in the state have the equivalent of ten or more times the vote allowed the appellants, in choosing members of the state legislature. Because appellants have on the average as little as one-tenth (1/10) of a vote in choosing members of the state legislature they have sought by this action to regain their rightful equal vote recognized and guaranteed by the Fourteenth Amendment of the Federal Constitution and the Tennessee Constitution.

The record before this Court establishes a purposeful and systematic plan, by continued enforcement of the originally unlawful Act of 1901, to discriminate against a geographical class of persons in Tennessee in their individual voting rights, with the effect of maintaining control of the state legislature in a selected minority of the Tennessee voting population. As a result, a favored 37% of the voters in Tennessee elect 20 of the

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[23] Ibid.

[24] Ibid. It should be noted that Rutherford, Bradley, Morgan, Blount, Campbell, Johnson, and Carter counties are unjustly denied separate representation. Baker complaint, ex D, R 26.

33 members of the state senate, while the remaining 63% of the voters elect but 13 of the 33 members. For the House of Representatives, a similarly favored 40% of the voters elect 63 of the 99 members of the House, while the remaining 60% of the voters elect only 36 of the 99 members.[25] In round figures, statewide, a ⅓ minority of the voters from predominantly sparsely populated counties, select a ⅔ majority of both houses. Significantly, no bill seeking reapportionment of the legislature since 1901 has received more than 13 votes in the state Senate nor more than 36 votes in the House.[26]

Illustrations of Some of The Practical Effects of The Inequality

Indictative of the effects of the denial of equal voting rights and under-representation has been the systematic use by the controlling minority of its powers, not only to perpetuate its control, but to derive special advantages at the expense of the under-represented majority of the people in such matters as the distribution of state funds. Statutes have been enacted for the support of the public schools and the maintenance of roads and highways, with distribution formulas which deliberately favor the over-represented counties. For example, Laws 1959 ch. 14, House Bill No. 123, in providing for a distribution of revenues collected in support of the educational system of the state, exempts the over-represented counties from application of the formula for contribution to their own county educational needs required of the under-represented counties where appellants live, but nevertheless guarantees the

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[25] Baker et al. complaint, Exhibits E and F, R 28-31.

[26] West complaint, exhibit 2, R 126.

exempt counties school funds in amounts previously paid to them by the state.[27]

Similar discriminatory results have occurred in respect to highway improvement. Of the seven cents collected by the state for the storage and sale of each gallon of gasoline, two cents is paid into a separate fund known as "County Aid Funds". Notwithstanding that said funds are derived from the consumption of gasoline one-half of the fund is distributed equally among the ninety-five counties of the state, one-fourth is distributed among the ninety-five counties on the basis of area, and only the remaining one-fourth is distributed among the counties on the basis of population.[28]

In the 1957-1958 apportionment of the county aid funds, the General Assembly permitted 23 counties to receive 57.9% more state aid than would be the case on a basis of state aid per capita, and it turns out that these counties had 23 more direct representatives than permitted under the state constitution. Ten counties, having 25 less direct representatives than required by the Tennessee Constitution,[29] among them Shelby, Knox, Hamilton, and Davidson, received 136.9% less state aid than on a per capita basis. Expressed another way, a voter in Moore County (with a voting population in 1950 of 2,340) has 17 times as much representation in the lower House as does a voter in Davidson County (1950 voting population 211,930), and Moore County receives 17 times the apportionment per vehicle of state gasoline taxes as does Davidson county.

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[27] Baker et al. complaint, R 17-18, and see R 161, particularly sub-paragraph (4) of Section 4 of House Bill 123 (R 172-173)

[28] Baker et al. complaint, R 16; Tenn. Code Ann., § 54-403 (1956)

[29] Amendment to West complaint, exhibit 9, R 254

These discriminatory distribution formulas in turn directly limit the counties in which appellants reside in the share they may obtain of federal aid for highway construction, because these funds are made available to the counties on a "fund matching basis".[30]

Similar patterns of unfair and arbitrary distribution of funds exist in respect of state sales and use taxes, income taxes, and alcoholic beverage and beer taxes.

The Closed Door To Direct State Relief

The preferential advantages achieved by the few at the expense of the many, in such things, among others, as the distribution of state funds, have provided the unrepresentative Tennessee General Assemblies of the last half-century an obvious motive for continued denial of equal voting rights and equal representation of large groups of persons geographically situated as plaintiffs are.

Unless judicial assistance is provided to stimulate the required corrective action, the discrimination in voting rights will continue, hopelessly, and will grow in proportion with the current trends of population growth.

Historical data made part of the pleadings[31] shows that all attempts since 1901 to obtain revision of the unlawful Act of 1901 and to obtain the required decennial reapportionments have been defeated in the legislature; and that no bill seeking to reapportion since 1901 has received more than 13 votes of the 33 in the Senate or more than 36 votes of the 99 in the House. Governors of Tennessee have repeatedly called

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[30] Ben West complaint, R 119-120.

[31] Documented Survey of Legislative Apportionment in Tennessee, 1870-1957, R 126-160.

upon the General Assembly for a fair apportionment law to no avail (for example, R 135, 145-147, 153, 155, 156-157).

The Tennessee Supreme Court has sealed the closed door of the legislature by holding that if it were to declare the Act of 1901 unconstitutional, it would deprive the state of its legislature and bring about the destruction of the state itself.[32]

A state constitutional convention is not an available remedy, because such a convention can only be called by a majority vote of two successive General Assemblies, Tenn. Const., art XI, sec. 3 (1870). All such proposals have been rejected in the past. Even if a convention were to be authorized, its delegates would be chosen in the unrepresentative manner reflecting the present legislative apportionment.

The Governor has no authority to assemble a constitutional convention, and the state constitution contains no provisions for direct popular action by initiative or referendum.

The Application For Federal Judicial Assistance

A remedy which would contemplate direct action against the state legislature or its members, requiring them to reapportion membership in the legislature among the counties and districts, has not been sought in this case. Named as defendants were the Secretary of State, the Attorney General, the Coordinator of Elections and the members of the State Board of Elections. The District Court was asked to do four things: (1) to enjoin the named defendants (appellees) from further enforcement of the Act of Apportionment

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[32] *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d 40 (1956), appeal dismissed 352 U.S. 920, see R 65.

of 1901 thus preventing future elections thereunder, (2) to declare unconstitutional and to enjoin enforcement of the Act of Apportionment of 1901, (3) to order an election at large without regard to the counties or districts, or (4) in the alternative, to direct the defendants (appellees) to hold an election in accordance with the formula for legislative representation provided in the state constitution, using the 1950 or subsequent federal census to determine the number of qualified state voters.

The District Court found that the issues presented in this case were "of such a character that they should be evaluated by a three-judge court." In referring the matter to a statutory court, District Judge Miller's opinion of July 31, 1959, cited certain differences between the case of *Colegrove* v. *Green*, 328 U.S. 549, and the case at bar. He pointed out that because the Act of Congress involved in the *Colegrove* case contained no requirement that congressional districts be approximately equal in population, the legislature of Illinois did not violate any provision of its own constitution or any provision of federal law. Further, he pointed to this Court's view in the *Colegrove* case, that there was ample power vested in Congress to redistrict if the congressional districts set up by state law were inequitable. But in Tennessee, said Judge Miller:

> "In the present case, as pointed out, not only is there a specific constitutional provision requiring periodic reapportionment on the basis of equality, but the legislature of the state has refused to act after repeated efforts and demands to obtain relief. The situation is such that if there is no judicial remedy there would appear to be no practical remedy at all." R 91.

A motion to dismiss was filed by the appellees upon the grounds that the statutory court did not have jurisdiction of the subject matter of the suit, that there had been a failure to state a claim upon which relief could be granted, and that certain alleged indispensable parties had not been joined. The case was heard on November 23, 1959 by the three-judge court on the pleadings of appellants and the motion to dismiss.

On December 21, 1959, in a per curiam opinion, the three-judge court dismissed the action on the ground that it could not intervene to grant the relief prayed for, stating however:

> "With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay." R 219.

On February 4, 1960, an order dismissing the complaint was entered by the District Court on the grounds that the court lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted. This appeal is from the final order, pursuant to 28 U.S.C. § 1253. Probable jurisdiction was noted November 21, 1960.

SUMMARY OF ARGUMENT

I

The Tennessee Constitution creates a system of proportional representation in both houses of the state legislature distributed by voting population in the counties and districts, and gives each qualified citizen an equal vote. Under the constitutional formula, this

is a measureable equality in voting rights and representation. To keep the equality current, there is a further constitutional provision requiring an enumeration of voters and reapportionment of the legislature every ten years.

The legislature has affirmatively, purposefully, and systematically nullified this voting right of appellants by adoption and maintenance of the Act of 1901 as the basis for apportionment and elections. When adopted and since, the Act was not based on the required enumeration of the qualified voters and has ignored the actual number of qualified voters in assigning among the counties and districts representation in both houses of the legislature. Since 1901 the legislature has defeated all proposals for the required enumerations and reapportionments.

The result has been to give to about $^1/_3$ of the total voters, located in certain favored areas, the privilege of electing and controlling $^2/_3$ of the membership of the state legislature. The geographic segregation of voters has meant that the voters in the less favored areas of the state have on the average a vote of about 1/10 the value of the votes of the most favored voters.

The Act of 1901, at the time of its adoption and since, violated all principles of reasonable classification of voters and has been openly and on its face the clearest sort of denial of equal protection of the laws under the Fourteenth Amendment. Not only is the Act discriminatory on its face in its departure from the standards of the state constitution, but it is without justification as a reasonable classification of voters and representatives, because the superior commands of the state constitution deprive the legislature of any discretion to classify voters in relation to seats in the legislature

differently from the proportioning of the seats to the size of the voting population of the several counties and districts. Because the invidious discrimination is patent on the face of the statute, proof of the discrimination does not depend on proof of extrinsic circumstances. Nevertheless, appellants have shown a serious maladministration and pattern of practical discriminations against them and those similarly situated (in, for example, the distribution of state funds), which has flowed from the failure of equal voting rights and the resulting inadequate representation.

The segregation of voters and the dilution of their vote is no different from the discriminatory action which this Court has protected against when the discrimination was founded upon race. The inequality, purposefully begun, has systematically continued and worsened with the growth in population and the defeat in succeeding legislatures of all attempts to periodically re-examine and reapportion as required by the positive command of law.

The "political" nature of the right to vote in equality is no bar to its judicial vindication under the precedents of this Court. Unlike *Colegrove* v. *Green*, 328 U.S. 549, this is not a case in which it can be argued that political judgment or discretion has been conferred upon the legislature to order its conception of balance between representation and voting rights. In this case the violation of appellants' federal rights to equal protection of the laws is unmistakeable and measureable by approximate mathematical standards provided by law.

In this case, unlike *Colegrove*, there is no alternative to judicial assistance if the doors to relief are to be unlocked. For 60 years reapportionment bills have

been deliberately defeated by the representatives of the over-represented minority. Messages from governors have fallen on deaf ears. The Tennessee Supreme Court, fully aware of the denial of the appellants' rights, has refused relief on the ground that it would destroy the state government. There is no initiative or referendum in Tennessee. Further constitutional change is closed off because it is controlled by the unrepresentative legislature. This Court is appellants' last and only hope if appellants' federally assured rights are to be vindicated.

Jurisdiction exists, as this Court held in *Smiley* v. *Holm*, 285 U.S. 355, and as a majority of the participating members of the Court held in *Colegrove*. The Court is not called on to "re-map" the state, or to hurriedly provide relief in the face of an impending election. The Court can hardly do less than agree with the District Court that there has been a "clear violation" of the rights of the appellants and that "the evil is a serious one which should be corrected without further delay." The Court has the opportunity and the duty to clarify its earlier decisions for the District Court so that it can provide the necessary relief in this voting rights case.

II

For achieving corrective action, appellants have kept practical considerations in mind and suggest a step-by-step approach, which does not involve an assumption by the District Court of legislative duties or responsibilities.

The first step would be a remand to the District Court with directions to vacate the existing order, and enter an order denying appellees' motion to dismiss and retaining jurisdiction of the case. History has

shown that assertion and retention of jurisdiction by a court (federal or state) has provided the necessary spur to legislative consideration of the facts laid before the court and has produced the necessary corrective action (in Minnesota, New Jersey, and elsewhere). By assuming and retaining jurisdiction and providing the legislature the interim opportunity to reconsider and correct inequalities in voting and representation, the Court does not assume the legislative task, but merely exposes the deficiencies in relation to constitutional requirements and in effect remits the matter to the legislature for further action and revision.

If a point should be reached where the District Court would be called upon to do more than assume and retain jurisdiction while the legislature takes corrective measures, there are several steps which may be taken separately or together. One might be enjoining the state election officials, who are among the appellees, from holding any future election under the Act of 1901. Another, together with the injunction or apart from it, might be a declaratory judgment under the federal Declaratory Judgment Act declaring the invalidity of the Act of 1901.

These forms of equitable relief have been afforded in the past in vindication of voting rights. They are supported not only by the Civil Rights Acts, the federal Declaratory Judgment Act, and the Constitution itself, but have been underscored by the recent 1957 amendment of the Civil Rights Act which places special emphasis on protecting, with equitable or other relief, the right to vote. Either or both remedies of injunction and declaratory judgment are certain to evoke the necessary corrective action by the Tennessee legislature, if the additional spur is needed.

If it is necessary for the District Court to consider further steps should the expectation of adequate response by the legislature not be realized, there are two additional alternatives for the District Court. Thus, if a further election is enjoined under the Act of 1901 and the legislature has not provided an adequate reapportionment in time for the next election (in 1962), the Court, taking judicial notice of any Tennessee enumeration (if made) or the 1950 or 1960 federal census of voting population, could itself, or through a master, apply the mathematical formula of the Tennessee Constitution to provide an apportionment under which the election officials may conduct the next election. Alternatively, the Court could direct the election officials to conduct the next election at large.

Either measure would be temporary and would contemplate that the legislature next elected would provide a suitable apportionment, measured by the state constitutional formula, before the District Court would relinquish jurisdiction of the case. The use of the constitutional formula most nearly resembles what the state constitution contemplates; but the state constitution also supports an election at large as an alternative temporary expedient since the legislature under the state constitution is "dependent upon the people" of Tennessee. On a like basis, this Court and others have supported elections at large when reapportionments have failed. If it should be needed, an election under the constitutional formula or at large would be a workable, sensible remedy since either would immediately and approximately restore appellants voting rights pending a valid reapportionment by the legislature.

Appellants emphasize that the steps suggested are progressive and not simultaneous steps, and that the

necessary and desired relief is likely to be achieved in the very first stage with the retention of jurisdiction. Each of the steps is designed to give meaning to the point that ultimate responsibility for providing adequate voting rights and representation through a proper apportionment statute rests with the legislature acting in accordance with state and federal constitutional requirements.

ARGUMENT

I

UNDER THE SYSTEM OF PROPORTIONAL REPRESENTATION AND EQUAL VOTING ORDAINED BY THE TENNESSEE CONSTRUCTION, THE UNAUTHORIZED PURPOSEFUL AND SYSTEMATIC DISCRIMINATION AGAINST APPELLANTS, WHICH DISTORTS AND REDUCES THEIR RIGHTFUL REPRESENTATION IN THE STATE LEGISLATURE, DENIES THEM A FULL VOTE IN EQUALITY WITH OTHER VOTERS AND IS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

A. The Constitution of Tennessee Provides A Measurable Equality of Voting Rights and Representation

The people of Tennessee in their Constitution of 1870 provided for a system of proportional representation in the state legislature and for free and equal elections, whereby the members of both houses would be responsive to the popular will and the members of the voting population would enjoy a general equality in expressing their will. Seats in both houses of the legislature were to be apportioned among the several counties and districts in proportion to the ratio of the

voting population of each to the total voting population of the state. A maximum number of 99 members for the House and 33 members for the Senate was provided and early reached, in 1880.

It was not expected that there would be one-for-one mathematical exactness in apportioning the membership of the legislature. For example, it was provided that a county with two-thirds of the voting population requisite for one seat in the House would be entitled to the one seat.

Nevertheless it was clearly contemplated that overall representation should, as nearly as possible, approximate relative voting population. Thus, to the extent that some counties might lose fractions of House seats in the calculations (by virtue of the two-thirds minimum seating rule above, or otherwise), it was provided that in apportioning senators among the different counties the fraction that may be lost by any counties should be made up to them in Senate representation as nearly as practicable. Tenn. Const. Art. II, sec. 6.

This intention to measure representation against voting population was specifically buttressed by the Declaration of Rights, that all power is inherent in the people, and that there shall be equality in the right of suffrage, Tenn. Const. Art. 1, secs 1 and 5; and by the provision of Article II sec 3, that the legislative authority of the state shall be vested in a General Assembly, consisting of a Senate and House of Representatives, "both dependent on the people."

To insure that the intention be implemented, the Tennessee Constitution further provided that within every ten years after 1871, an enumeration of the qualified voters and an apportionment of the representatives in the legislature shall be made.

Thus the system of government ordained for Tennessee, and expressed in its Constitution, was one representative of the people of the whole state with substantial equality of voting rights vested in the people statewide, in order to maintain direct responsiveness of the legislature to the majority will of the people.

B. The Denial of Equality of Voting Rights Is Patent, And Has Been An Affirmative, Purposeful, and Systematic Denial of Equal Protection of the Laws.

Following the adoption of the Tennessee Constitution in 1870, only three of the required decennial reapportionments were made, the last by the Act of 1901. This Act was itself violative of the organic law because an enumeration of the qualified voters was not made (though there was a proposal to refer to the federal census of 1900, R 138) and the actual number of qualified voters as disclosed by the census was ignored by assigning less seats to eleven counties entitled to more (R 232). Since 1901 no further reapportionments have been made, despite all efforts to obtain legislative action, and despite the growing distortion, in the intervening years, between population in certain geographic areas and representation of that population under the apportionment of 1901. The result (Statement of Case, supra) is a legislature two-thirds of whose members are chosen by one-third of the total voters, located in certain favored areas, and the reduction of the contemplated equal votes of the other two-thirds of the voters to a fraction of their intended worth, on the average, in comparing votes by counties, at about one-tenth the value of the votes of the most favored voters.

There was no basis for this discriminatory classification in 1901 or since. The only true and authorized

basis for classification of voters and the derivative representation of them in the legislature under the Tennessee Constitution was ignored, and continues to be ignored, by the succession of Tennessee legislatures who, from 1901 forward, have deliberately and systematically maintained the inequality.

This is the clearest sort of denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution since the statute which is the source of the forbidden discrimination, when compared with the commands of the organic law of Tennessee, is patently and on its face discriminatory against appellants and an overwhelming majority of the voters, and does not depend on proof of extrinsic circumstances (as in *Neal* v. *Delaware*, 103 U.S. 370, 394), or discrimination or inequality in adminstration (as in *Yick Wo* v. *Hopkins*, 117 U.S. 356, 373-374), to demonstrate that it violates the equal protection of the laws provision of the Fourteenth Amendment. See discussion of the cases in *Snowden* v. *Hughes*, 321 U.S. 1, 8-10. The continued systematic discrimination over 60 years has served to aggravate the forbidden inequality under the federal constitution.[33]

That a serious mal-administration, and pattern of

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[33] In testimony handed up as a supplemental brief by plaintiffs in *Magraw* v. *Donovan*, 159 F. Supp. 901 (D.C. Minn. 1958), 163 F. Supp. 184, 177 F. Supp. 803, where the District Court took jurisdiction in a situation involving Minnesota voters similar to this case, Dr. William Anderson, Professor Of Political Science Emeritus of the University of Minnesota, said of the case development under the Fourteenth Amendment: "It is significant, however, that the equal protection principle was extended to an important political right, the right to vote, and that the right to equality in voting for legislative members is exactly the right that is involved in apportionment cases."

practical discriminations against appellants and those similarly situated, has in fact flowed from the failure of equal voting rights and the resulting inadequate representation has nevertheless been set forth in examples by the appellants and not denied by the appellees (Statement of Case, supra), as a means of showing why the impairment of appellants' voting rights is an evil which, as the District Court agreed, "is a serious one which should be corrected without further delay", R. 219.[34]

Not only is the Act of 1901 discriminatory on its face in its departure from the standards of the state constitution, but it is devoid of any justification as a reasonable classification of voters and representatives,[35] because the superior commands of the state constitution deprived the legislature of any discretion to classify voters in relation to the seats in the legislature differently from the proportioning of the seats

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[34] "Equality of representation in the legislative bodies of the state is a right preservative of all other rights. The source of the laws that govern the daily lives of the people, the control of the public purse from which the money of the taxpayers is distributed, and the power to make and measure the levy of taxes, are so essential, all-inclusive, and vital that the consent of the governed ought to be obtained through representatives chosen at equal, free and fair elections. If the principle of equality is denied, the spirit, purpose, and the very terms of the Constitution are emasculated. The failure to give a county or a district equal representation is not merely a matter of partisan strategy. It rises above any question of party, and reaches the vitals of democracy itself." *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315, 321 (1931).

[35] Mr. Justice Frankfurter has said that classification by the state must be "rooted in reason", *Griffin* v. *Illinois*, 351 U.S. 12, 21 (concurring opinion); and Mr. Justice Jackson has said that equal protection "requires that classification rest on real and not feigned differences", *Walters* v. *City of St. Louis*, 347 U.S. 231, 237.

to the size of the voting population of the several counties and districts.

The disparity in voting rights effected by the succession of Tennessee legislatures has thus denied to appellants a full vote in equality with other voters of Tennessee, without even the semblance of justification which a majority of this Court may have thought was present in *South* v. *Peters*, 339 U.S. 276. There, it will be recalled, the lower federal court had decided under the Georgia constitution that there was no guarantee of a substantially equal vote in elections and the dismissal of the suit to set aside the Georgia county unit vote in a primary election for United States senator was upheld. The instant case is the opposite, in that the Tennessee Constitution requires and guarantees a substantially equal vote, and the lower federal court plainly said that this right is being denied unlawfully to appellants by the Tennessee legislature (R 219.).

Nor is there absent in this case the objective measure for equality, which some of the members of this Court may have thought was absent in *Colegrove* v. *Green*, 328 U.S. 549, for here the Tennessee Constitution has provided a mathematical formula by which to measure representation and equality in voting, but which the Tennessee legislature deliberately ignores.

The inequality practiced in this case was effected by geographically segregating appellants and other voters in the same areas of the state from favored voters and areas, and discriminating against the former by diluting the value of their votes in comparison with the favored voters.[36] This inequality, unlike that in *Cole-*

[36] In *Gomillion* v. *Lightfoot*, 364 U.S. 339, Mr. Justice Whittaker was of the view (concurring opinion) that the conduct of the state

grove v. *Green*, *supra*,[37] began with affirmative discriminatory action of the legislature in 1901[38] and was purposefully and systematically continued and worsened by the defeat in succeeding legislatures of all attempts to periodically re-examine and reapportion, as required by positive command of law, R 126-160.

This course of discriminatory action has caused a denial of the equal protection of the laws to appellants exactly as if the discrimination had occurred because of race. As stated by a minority of this Court in *South* v. *Peters*, 339 U.S. 276:

> "It is said that the dilution of plaintiff's votes . . . is justified. . . . If that premise is allowed, then the whole ground is cut from under our primary cases since *Nixon* v. *Herndon*, which have insisted that where there is voting there be equality. . . . [T]here shall be no inequality in voting power

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in "fencing out" a group of Negro citizens from voting in municipal elections was an unlawful segregation in violation of the equal protection clause of the Fourteenth Amendment, rather than the abridgment of the right to vote under the Fifteenth Amendment found by the rest of the Court.

[37] In *Gomillion* v. *Lightfoot*, *supra*, this Court in describing *Colegrove* said that the disparity in districts "came to pass solely through shifts in population" and that "The appellants in *Colegrove* complained only of a dilution of the strength of their votes as a result of legislative inaction over a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords."

[38] The Act of 1901 was not based on a fresh enumeration of qualified voters, though it was proposed that the 1900 federal census be used. R 138-139. Actually, the 1900 census was disregarded, and as a result the voters in eleven counties were given less representation than they were entitled to. R 232.

by reason of race, creed, color, or other invidious discrimination." 339 U.S. at 281.

Geographic discrimination and racial discrimination are equally onerous.[39] Although the federal constitution does not give rise to the individual citizen's right to vote, since this franchise springs from the individual states themselves, *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162; *McPherson* v. *Blacker*, 146 U.S. 1, nonetheless, where state law grants such a right, each citizen must be equally protected in the operation of that law. *United States* v. *Reese*, 92 U.S. 214; *United States* v. *Cruikshank*, 92 U.S. 542. The Tennessee Constitution grants the full right of suffrage to appellants. There can be no dilution by the state of that right to vote through the medium of fractional representation for certain voters and full representation for other voters.[40]

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[39] "The Supreme Court has stricken many attempts to discriminate in elections because of race, creed or color. . . . A classification which discriminates geographically has the same result. . . . Any distinction between racial and geographic discrimination is artificial and unrealistic. Both should be abolished." *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220, 236 (D.C. Hawaii, 1956), reversed because question was mooted by corrective action of Congress. 256 F. 2d 728 (9th Cir. 1958).

[40] *Ex Parte Siebold*, 100 U.S. 371; *Ex Parte Yarbrough*, 110 U.S. 651; *United States* v. *Mosley*, 238 U.S. 383; *Nixon* v. *Herndon*, 273 U.S. 536; *United States* v. *Saylor*, 322 U.S. 385; *United States* v. *Classic*, 313 U.S. 299, *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

The deprivation of right from dilution of the ballot is aptly phrased in *State ex rel South St. Paul* v. *Hetherington*, 240 Minn. 298, 61 N.W. 2d, 737 (1953) where the Minnesota Supreme Court stated that: "The right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self-government. Fundamental rights may be lost

Otherwise, and this is now the case in Tennessee, an elective franchise to all intents and purposes is lost. An unequal voice in elections and a complete denial of participation in an election are of the same offensive order.

C. Notwithstanding Its "Political" Nature, The Measurable Right To Equality In Voting Denied In This Case Is Protected By The Fourteenth Amendment—Colegrove Distinguished.

The Fourteenth Amendment has been a constant protector of voting rights against discriminatory state action notwithstanding the objection that the subject matter is political. In *Nixon* v. *Herndon*, 273 U.S. 536, the Court held that Texas legislation prohibiting Negroes from participating in a primary election directly contravened the Fourteenth Amendment. Said Mr. Justice Holmes, speaking for the Court:

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action when it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over 200 years. . . .
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> ". . . We find it unnecessary to consider the 15th Amendment because it seems to us hard to imagine a more direct and obvious infringement of the 14th. . . . What is this but declaring that the law

by dilution as well as by outright denial. To whatever extent a citizen is disenfranchized by denying him reasonable equality of representation, to that extent he endures taxation without representation, and the democratic process itself fails to register the full weight of his judgment as a citizen."

> in the states shall be the same for the black as for the white, that all persons, whether colored or white, shall stand equal before the laws of the states. . . ." 273 U.S. at 540, 541.[41]

Mr. Justice Frankfurter, citing this view in answer to the "political" subject matter objection in a related situation under the Fifteenth Amendment in *Gomillion* v. *Lightfoot*, *supra*, observed on behalf of the Court, that a statute which is alleged to have worked an unconstitutional deprivation of rights is not immune to attack simply because the mechanism employed by the legislature is a definition of local boundaries.

The situation condemned in *Gomillion* may not have been the same situation permitted to stand in *Colegrove* v. *Green* (as Mr. Justice Frankfurter went on to add); nevertheless *Colegrove* did not pass upon or decide the situation in the case at bar, which presents the unmistakeable violation (recognized by the District Court below) of the appellants' federal rights to equal protection of the laws in the exercise and enjoyment of their voting rights. Unmistakeable because the discrimination, affirmatively and purposefully undertaken by the legislature in 1901, and systematically continued and extended, is unclouded by doubts that discretion may have been confided in the legislature to make a "political" judgment favoring unbalanced voting rights, or doubts as to the standard or measure by which to recognize and remedy the inequality of voting rights. Thus, in *Colegrove*, there was no mandatory requirement of a state constitution

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[41] See also, *Snowden* v. *Hughes*, 321 U.S. 1, 11; *McPherson* v. *Blacker*, 146 U.S. 1; *Coleman* v. *Metter*, 307 U.S. 433; *Nixon* v. *Condon*, 286 U.S. 73.

for apportionment or requirement in federal law for congressional districts of approximately equal population. The Court relied on *Wood* v. *Broom*, 287 U.S. 1, which held that the standards for nearly equal, compact, and contiguous districts earlier required in the 1911 districting act, had been dropped by Congress when it adopted the controlling 1929 redistricting act. In fact the prevailing opinion in *Colegrove* indicated that this was, by itself, sufficient reason to decide against the plaintiffs in *Colegrove*, 328 U.S. at 551.

Whatever may have been the violation in *Colegrove* or the doubts of some of the justices concerning it, here the violation is affirmative, patent, measurable, and leaves no room for doubt. Unlike *Colegrove* there is no alternative to judicial assistance if relief is ever to be obtained. There the door to legislative relief, including relief by the Congress of the United States, appeared to be open; here it is sealed tight as demonstrated by 60 years of deliberate defeat of the required reapportionments by the over-represented minority, the support by the Tennessee Supreme Court of this disobedience of superior law, and the control by the unrepresentative legislature of the machinery for further constitutional change. (See Statement of Case, supra pp. 14-15.) In *Colegrove* there seemed to be reasons, for some of the Court, to withhold the granting of equitable relief.[42] Here there is not only jurisdic-

[42] A majority of four (of seven) members of the Court in *Colegrove* v. *Green* were of the view that the federal courts had jurisdiction to provide a remedy and three of the four would have granted relief; but because he thought on the facts that discretion to withhold the equity remedy should be exercised, the fourth member voted with the three other members, who thought the remedy

tion,[43] but no necessity for a court to "affirmatively re-map" the state.[44] Here there are no special circumstances, such as impendency of an election (the next for Tennessee is 1962) or the delicacy of relations with Congress; and most importantly there is present what may have been missing for some in *Colegrove*, namely the clearly visible violation of law and the means built into local organic law for applying and measuring a judicial remedy that does not require judicial activity in the legislative field.

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should be provided by political process without judicial help, to constitute a majority which affirmed dismissal of the suit.

As Mr. Justice Rutledge said of *Colegrove* in *Turman* v. *Duckworth*, 329 U.S. 675, 678: "A majority of the Justices participating refused to find there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied."

It is fair to say, therefore, that this Court did not hold in *Colegrove* that it lacked jurisdiction, but rather that it ought not inject a judicial remedy where the existence of a legal wrong is unclear. Even before *Colegrove*, it was established that this Court could and would reject a clearly invalid state apportionment statute, and in the absence of a valid apportionment, assure voting rights by election at large, *Smiley* v. *Holm*, 285 U.S. 355.

[43] *Smiley* v. *Holm*, 285 U.S. 355; *Turman* v. *Duckworth*, 329 U.S. 675, 678; and see note 42, supra. See also, *Leser* v. *Garnett*, 258 U.S. 130.

[44] The possibility of having to "affirmatively re-map the Illinois districts" seemed to have been a concern expressed in *Colegrove* v. *Green*, 328 U.S. 549, 553.

II

THE DENIAL OF VOTING EQUALITY IN TENNESSEE MUST BE TERMINATED, AND CAN BE ENDED WITHOUT USURPATION OF LEGISLATIVE PREROGATIVES OR DIFFICULTY, THROUGH THE USE OF ONE OF MORE OF SEVERAL MEANS OF JUDICIAL RELIEF.

A. The First Step—Retention Of Jurisdiction By The District Court

In achieving corrective action, appellants have been mindful that *Colegrove* v. *Green* indicated the concern of this Court for practical considerations when relief is sought in cases involving voting rights. Nevertheless, from actual experience, it is quite likely that voting inequality can be terminated in Tennessee without encountering the difficulties anticipated in that case.

For this purpose appellants feel that a step-by-step approach, utilizing certain alternative forms of relief is both feasible and important.

The first step would be a remand to the District Court with directions to: (1) vacate the existing order, and (2) enter an order denying appellees' motion to dismiss and retaining jurisdiction of the case. Whatever else this Court may add will be important, but if it did no more at this stage, there is every reason to believe from history and experience, that the assertion and retention of jurisdiction by the District Court will provide the necessary spur to legislative action, which has been missing and sorely needed in this case.

In *Magraw* v. *Donovan*, this is precisely what was done by the federal District Court in Minnesota, and the desired result followed. The court declined to ac-

cept the contention that reapportionment was not a justiciable issue and convened a three-judge court to hear the merits of the matter, 159 F. Supp. 901 (D.C. Minn. 1958). The three-judge court retained jurisdiction pending the 1959 session of the Minnesota legislature, saying in a per curiam opinion (163 F. Supp. 184, 187-188):

> "Here it is the unmistakeable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes. Minnesota Constitution, Article 4, Sections 2 and 23; *Smith* v. *Holm*, supra, at page 490 of 220 Minn., 19 N.W. 2d 914; *State ex rel. Meighen* v. *Weatherhill*, supra, page 341 of 125 Minn., 147 N.W. 105. Early in January 1959 the 61st Session of the Minnesota Legislature will convene, all of the members of which will be newly elected on November 4th of this year. The facts which have been presented to us will be available to them. It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to 'heed the constitutional mandate to re-district.' *Smith* v. *Holm*, *supra*, at page 490 of 220 Minn., at page 916 of 19 N.W. 2d.
>
> "It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly

and deliberately failed and refused to perform its constitutional duty to redistrict the State.

"The Court retains jurisdiction of this case. Following adjournment of the 61st Session of the Minnesota Legislature, the parties may, within 60 days thereafter, petition the Court for such action as they, or any of them, may deem appropriate."

Thereafter, at the 1959 session the legislature enacted a new apportionment act as a result of which the litigation was dismissed, 177 F. Supp. 803 (1959).

A similar result was achieved by the District Court for Hawaii in *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (DC Hawaii 1956).[45] There the court denied a motion to dismiss a suit attacking the districts of the territorial legislature, unchanged since 1901, as in violation of the Fourteenth Amendment and the reapportionment provision of the Hawaii Organic Act, and seeking an injunction to require an election at large. After trial the judge announced orally his decision to grant the requested relief. The Congress made further action unnecessary by amending the Organic Act to provide new districts and transferring future authority to the governor supervised by the territorial supreme court.[46]

Some of the state courts have adopted a similar approach to the problem. The most recent was in the New Jersey Supreme Court in *Asbury Park Press* v. *Woolley*, 33 N.J. 1, 161 A2d 705 (1960). This was a suit for declaratory judgment and injunctive relief claiming failure of the legislature to reapportion under the state constitutional requirement. Reversing

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[45] Reversed on other grounds, i.e. because question was mooted by corrective action of Congress, 256 F. 2d 728 (9th Cir. 1958).

[46] The account is set out in Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057, 1088-1089 (1958).

a lower court dismissal (which had held the matter was solely for the legislature), the Supreme Court retained jurisdiction and postponed a decision on the merits in order to give the legislature meeting in 1961 the opportunity to take corrective action by adoption of a reapportionment act. In response to the argument that its judging the existing apportionment to be violative of the state constitution would cause chaos and anarchy and disrupt the state government, the court said that a judiciary conscious of its oath to support the constitution "cannot accept the *in terrorem* argument based upon the notion that members of a co-equal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature." On February 1, 1961, the New Jersey legislature adopted and the Governor approved a reapportionment act.[47]

The New Jersey Supreme Court, in collecting the authorities, called attention to the fact that as far back as 1938 the courts of twenty-two states had either exercised the power or stated they had the power to review reapportionment acts upon constitutional grounds; and singled out as examples of compliance by the legislature, once the judiciary had found an apportionment act invalid, the two *State* v. *Cunningham* cases, 83 Wis. 90, 53 NW 35 (1892) and 81 Wis. 440, 51 NW 724 (1892), which reveal that twice in one year the Wisconsin Supreme Court declared successive apportionment acts invalid and the legislature responded with a third act which proved to be valid.

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[47] N.Y. Times, Feb. 2, 1961, pp. 1 and 16.

B. No Assumption Of Legislative Functions By The Court

By assuming and retaining jurisdiction and providing the legislature an opportunity to reconsider and correct the inequalities in voting and representation the court does not assume legislative tasks. The same is true at the point when the court expressly decides on the merits, if it is so required, that the apportionment is invalid. In the first case, on a prima facie showing, and in the second case, on a full showing[48] and finding, the court simply exposes the deficiency in relation to constitutional requirements, and in effect remits the matter to the legislature for further action and revision, just as the court remands an erroneous order of an administrative agency for further action. In neither case does the court redraft the statute or the order. Disapproval of the statute returns the matter to the legislature. As Mr. Justice Frankfurter said, in *Niemotko* v. *Maryland*, 340 U.S. 268, 285 (concurring), "A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate" to satisfy the Fourteenth Amendment.

C. Injunction, Declaratory Judgment

Assuming that a point might be reached where the District Court would be called upon to do more than retain jurisdiction and afford the legislature the opportunity to take corrective measures, there are several

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[48] In this case the necessity of a hearing on the merits concerning the violation may be academic, since the violation has never been denied, the defenses have been jurisdictional, and, because the wrong is patent, the District Court has already expressed the view tantamount to a finding that there has been "a clear violation . . . of the rights of the plaintiffs." R 219.

steps, well within the recognized powers of the court, that may be taken separately or together.

As the District Court below made clear, we are dealing here with the deprivation of voting rights of individuals, and the precedents support vindicating such rights by injunctive relief or by declaratory judgment, or both. Useful examples are *Terry* v. *Adams,* 345 U.S. 461; *Smiley* v. *Holm,* 285 U.S. 355; *Hawks* v. *Smith* (No. 1), 253 U.S. 221; *Rice* v. *Elmore,* 165 F 2d 387 (4th Cir. 1947), cert. denied 333 U.S. 875.

These remedies rest not only on the Civil Rights Act, 42 U.S.C. 1983, in conjunction with 28 U.S.C. 1343(4), and the federal Declaratory Judgment Act, 28 U.S.C. 2201-02; but equitable relief from an unconstitutional act can be based directly upon the federal constitution, *Ex parte Young,* 209 U.S. 123; *Youngstown Sheet and Tube Company* v. *Sawyer,* 343 U.S. 579. It is noteworthy that the Congress specifically reinforced the means for providing equitable relief in voting rights cases by enacting, as a separate title, Part III of the Civil Rights Act of 1957, to wit, 28 U.S.C. 1343 (4), which states that the District Court shall have original jurisdiction of any civil action:

> "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" [emphasis added]

The Civil Rights Act of 1960 defines the word "vote" to include "all action necessary to make a vote effective". 74 Stat. 91. Both Acts add impetus for judicial assistance rather than judicial reluctance in using equitable jurisdiction to protect voting rights. Borrowing from another situation, "it is fair to say that in all this Congress expressed a mood . . . not merely by oratory, but by legislation." *Universal Camera Corp.*

v. *National Labor Relations Board*, 340 U.S. 474, 487.

It is therefore suggested, that if the need should arise, the District Court could enjoin the state election officials from holding any future election under the Act of 1901. This avoids action directly against the state legislature, but is in keeping with the proposition that:

> "... The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State's government ... denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." *Cooper* v. *Aaron*, 358 U.S. 1, 16-17.

Such an injunction, in our view, is almost certain to evoke the necessary action by the Tennessee legislature, if the additional spur is needed to prompt the enactment of the required reapportionment. Jurisdiction, of course, would be retained until suitable action was taken.

In connection with an injunction against further use of the Act of 1901 as the basis for future elections, the court could, if it chose, issue a declaratory judgment declaring the invalidity of the Act of 1901. This in tandem with the injunction, or even by itself, would have the same stimulating effect in achieving reapportionment by the legislature, as would the injunction alone. Nevertheless, if the injunction were to be used, there would seem to be no real necessity for a declaratory judgment.

D. Kidd v. McCanless Placed In Proper Perspective

However, apart from a declaration being surplusage, if it is said that the federal court may not use a declaratory judgment in this case because of the Tennessee Supreme Court decision in *Kidd* v. *McCanless*, 200 Tenn. 282, 292 S.W. 2d 40 (1956) appeal dismissed 352 U.S. 920, it is worth noting certain facts. The *Kidd* case held only that a declaratory judgment under Tennessee law, if applied to declare the apportionment Act of 1901 unconstitutional, would deprive Tennessee of the existing legislature and the means of electing a new one and bring about the destruction of the state, R 65. This was the only point decided and the Tennessee Supreme Court made this clear in denying the petition for rehearing, R 67.[49] It never reached the questions in this case.

The *Kidd* case therefore did not decide the efficacy of the federal Declaratory Judgment Act as a remedy; and even if it had, the state court's view on the application of a federal statute and federal remedy to vindicate a federally protected right would not be dispositive or binding on this Court, *United States* v. *Allegheny County*, 322 U.S. 174, 183. This Court may therefore take its own view of the matter.[50]

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[49] The United States Supreme Court dismissed the appeal in a per curiam notation, 352 U.S. 920, simply citing *Colegrove* v. *Green*, 328 U.S. 549, and *Anderson* v. *Jordan*, 343 U.S. 912, also a per curiam dismissal which relied on *Colegrove*.

[50] Even if the remedy were a matter of state law that stood in the way of dealing with the federal question, this Court has held it is within its province to inquire whether the decision of the state court rests upon a fair and substantial basis, and if it does not to decide the constitutional question, *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282. Where a United States district court and the Supreme Court have jurisdiction because questions are raised

In the first place, strictly speaking, the de facto or de jure status of the members of the legislature is not reached in this challenge of the existing apportionment act (by declaration or otherwise). The attack is not aimed as an ouster of the members of the legislature or a challenge of their right to sit. Each house of the legislature is itself the judge of the qualifications and election of the members of each, Tenn. Const., Art II, sec 11, and the Tennessee courts will not intervene, *State* v. *Shumate*, 172 Tenn. 451, 454-455, 462-463; *Gates* v. *Long*, 172 Tenn. 471. The attack is against the continued use, in the future, of the Act of 1901 as the basis for choosing members of succeeding legislatures.

In the second place, even if there is a question concerning status of the legislature, functioning under the invalid apportionment act, to enact the corrective apportionment act, the weight of authority and reason support the view that the members of the legislature are de facto officers and the corrective act is valid. *Matter of Sherrill* v. *O'Brien*, 188 N.Y. 185, 81 N.E. 124 (1907); *Lang* v. *Bayonne*, 74 N.J.L. 455 (E. and A. 1907); *Asbury Park Press* v. *Woolley*, 33 N.J. 1, 162 A. 2d 705 (1960); *State* v. *Carroll*, 38 Conn. 449, 9 Am. Rep. 409 (1871); *Parker* v. *State*, 133 Ind. 178, 31 N.E. 1114 (1892); *Denny* v. *State*, 144 Ind. 503, 42 N.E. 929 (1896); *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892); Id., 83 Wis. 90, 53 N.W. 35 (1892), *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564, appeal dismissed and cert. denied 332 U.S. 717 (1943), and see Beaver v. Hall, 142 Tenn. 416, 433, 217 S.W. 649 (1920).[51]

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under the federal constitution, both may pass on all questions of state law so far as necessary to a decision, *United Fuel Gas Co.* v. *Railroad Commission*, 278 U.S. 300, 307.

[51] Contra, *Kidd* v. *McCanless*, supra; *Fesler* v. *Brayton*, 145 Ind. 71, 44 N.E. 37 (1896); *State* v. *Zimmerman*, 249 Wis. 101, 23 N.W.

The reasoning is founded in public policy.

This Court, which has come a long way from *Norton* v. *Shelby County*, 118 U.S. 425, to *Chicot County* v. *Baxter*, 308 U.S. 371, 374, to support the de facto doctrine, has every reason to support a rule and public policy which will assure that "the streams of legislation" do not "become poisoned at the source".[52]

In the third place, even if we were to assume, contrary to the weight of authority and reason, that *Kidd* v. *McCanless* is correct in its view that a judgment declaring the invalidity of the 1901 apportionment act would terminate the existing legislature, it would strike us that the District Court, fully conscious as it is of the needs and constitutional rights of the appellants and of the large majority of the people of Tennessee, could without difficulty balance the popular needs against the alleged impediment by the simple expedient of delaying entry of the final order or mandate to which appellants are entitled. This would serve notice on the legislature that it is obliged to act, without impairing its ability, as the Tennessee court sees it, to validly act.

E. An Election By Constitutional Formula Or At Large

The remedial steps outlined so far envision the adequate response of the legislature when the court advises, by one method or another, that the Act of 1901 is

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2d 610 (1946); *State* v. *Schnitzer*, 16 Wyo. 479, 95 P. 698 (1908); *Winnie* v. *Stoddard*, 25 Nev. 452, 62 P. 237 (1900).

[52] Chafee, Congressional Reapportionment, 41 Harv. L. Rev. 1015, 1016 (1929). As Lewis says (Legislative Apportionment and the Federal Courts), "Of what use is the right of a minority—or a majority, as is often the case in malapportioned districts—to apply persuasion if the very machinery of government prevents political change?" 71 Harv. L. Rev. 1057, 1097.

invalid and is no longer a basis for future elections. History reveals that this is what has happened in other states when the federal or state courts have acted, and there has been no collapse of state governments, despite the fears expressed for Tennessee by its high court.

If it is necessary to consider further steps, should the expectation not be realized, appellants in their pleadings have suggested two additional alternatives for the District Court. Thus, if any further election under the Act of 1901 is enjoined and the legislature fails to provide an adequate reapportionment in time for the next election (1962), the court, taking judicial notice of any Tennessee enumeration (if made) or the 1950 or 1960 federal census of voting population in Tennessee,[53] could itself, or through a master, apply the mathematical formula of the Tennessee Constitution to provide an apportionment under which the election officials may conduct the next election. Alternatively, the court could direct the election officials to conduct the next election at large.

Either measure would be temporary, and would envisage that the legislature next elected, under either expedient, would provide a suitable apportionment, measured by the state constitutional formula, before the court would relinquish jurisdiction of the case.

The use of the mathematical formula of the state constitution, with the slight adjustments needed, may present some incidental questions of judgment for the court or master. But this course, as a temporary substitute (until a legislature acts) would most nearly resemble what the state constitution contemplates.

An election at large, as the alternative temporary expedient, while not the primary contemplated method

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[53] *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892).

of voting for the legislature under the state constitution, is nevertheless grounded upon it, and is aided by precedents laid down by this Court and others.

In *Smiley* v. *Holm*, 285 U.S. 355, affecting Minnesota, and *Carroll* v. *Becker*, 285 U.S. 380, affecting Missouri, this Court invalidated improperly adopted reapportionment statutes of both states relating to congressional districts, and directed that representatives be elected from each state at large until new districts were created. Mr. Chief Justice Hughes, speaking for a unanimous Court, rested the election at large, in the absence of appropriate districting, on the provision of Article 1, section 2 of the Constitution of the United States which provides that members of the House of Representatives shall be chosen "by the people of the several states."

The Constitution of Tennessee is equally, if not more explicit. Article II section 3, provides that the General Assembly shall consist of a Senate and House of Representatives "both dependent on the people". Article I section 1 of the Declaration or Bill of Rights declares that "all power is inherent in the people"; and Article XI section 16 places this declaration on a high pedestal, beyond the reach of alteration by the legislature or other branches of the government, by providing that everything in the Bill of Rights is "excepted out of the general powers of government and shall forever remain inviolate".

These provisions provide the back-up when the usual processes for election by counties and districts fail, and render insubstantial the dicta in *Kidd* v. *McCanless* that "there is no provision of law" for an election at large of the legislature, R 61-62. Under the authority of *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282, and *United Fuel Gas Company* v. *Railroad Commis-*

sion, 278 U.S. 300, 307, see note 50 supra, there is nothing preventing, and compelling reason for, the District Court to apply the remedy of election at large, should it become necessary in order to effectuate appellants' rights.[54]

If needed, an election either at large or under the constitutional formula would be a workable, sensible remedy which would immediately and approximately restore appellants' constitutional rights pending a valid reapportionment by the General Assembly.

CONCLUSION

Appellants have brought to this Court a case and controversy where the federally guaranteed right of equal protection in their voting rights has been violated. The record shows that it is no longer reasonable to expect that those who benefit by the wrong, and who control the state legislature by reason of the unlawful apportionment, will of their own volition relinquish the advantage or terminate the control.

The Court has jurisdiction. There are no detracting factors present, which in earlier cases permitted room for discretion in granting or withholding relief. On the contrary, there are the compelling circumstances (1) that all other avenues of relief are blocked, unless this Court provides the impetus to unblock them; (2)

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[54] In this connection, the Virginia Supreme Court ordered an election at large "despite an explicit provision of the Virginia Constitution to the contrary", where the state's congressional districts were found to violate the provision of the state constitution requiring that the districts should contain an equal number of inhabitants as nearly as practicable. *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105 (1932). The state's representatives were chosen at large, and valid new districts were drawn before the election of the next Congress. See Lewis, 71 Harv. L. Rev. 1057, 1070.

the type of Fourteenth Amendment violation is one commonly relieved by this Court; and (3) the constitution of Tennessee contains the standards for providing the relief without any necessity for a court to "affirmatively re-map" the state.

This Court can hardly do less than agree with the District Court below, that there has been "a clear violation" of the rights of the appellants, and that "the evil is a serious one which should be corrected without further delay", R 219. In so doing, there is a duty to clarify its earlier decisions for the District Court so that the appearance is not maintained, as it was interpreted below, that there is some form of inviolable bar to giving relief in this voting rights case.

We opened the discussion of remedies with the thought that a step-by-step approach on the part of the District Court would achieve the necessary and desired relief, probably in the very first stage with the retention of jurisdiction. We adhere to that view, and trust that this Court will give the District Court the opportunity to set the process in motion.

However, we cannot overemphasize that each progressive step outlined, if it becomes necessary, does not involve an assumption by the District Court of legislative duties or responsibilities. Each step is designed to implement the point that the ultimate responsibility for providing adequate voting rights and representation through a proper apportionment statute is on the legislature of Tennessee, acting in accordance with state and federal constitutional requirements.

It is respectfully requested that the Court reverse the order of the District Court below with directions to

(1) vacate its order of dismissal,
(2) enter an order denying the motion of the appellees to dismiss, and
(3) retain jurisdiction of the case in accordance with the instructions for relief by this Court.

Respectfully submitted,

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APPENDIX A

Act of Apportionment, Public Acts of Tennessee, Ch. 122 (1901), now TENN. CODE ANN. §§ 3-101 to 3-107 (1956):

§ 3-101. *Composition—Counties electing one representative each.*—

The general assembly of the state of Tennessee shall be composed of thirty-three (33) senators and ninety-nine (99) representatives, to be apportioned among the qualified voters of the state as follows: Until the next enumeration and apportionment of voters each of the following counties shall elect one (1) representative, to wit: Bedford, Blount, Cannon, Carroll, Chester, Cocke, Claiborne, Coffee, Crockett, DeKalb, Dickson, Dyer, Fayette, Franklin, Giles, Greene, Hardeman, Hardin, Henry, Hickman, Hawkins, Haywood, Jackson, Lake, Lauderdale, Lawrence, Lincoln, Marion, Marshall, Maury, Monroe, Montgomery, Moore, McMinn, McNairy, Obion, Overton, Putnam, Roan, Robertson, Rutherford, Sevier, Smith, Stewart, Sullivan, Summer, Tipton, Warren, Washington, White, Weakley, Williamson and Wilson. (Acts 1881 (E. S.) ch. 5, Section 1; 1881 (E. S.), ch. 6, Section 1; 1901, ch. 122, Section 2; 1907, ch. 178, Sections 1, 2; 1915, ch. 145; Shan., Sec. 123; Acts 1919, ch. 147; Sections 1, 2, 1925 Private ch. 472, Section 1; Code 1932, Section 140; Acts 1935, ch. 150, Section 1; 1941, ch. 58, Section 1; 1945, ch. 68, Section 1; C. Supp. 1950, Section 140.)

§ 3-102. *Counties electing two representatives each.*—The following counties shall elect two (2) representatives each, to wit: Gibson and Madison. (Acts 1901, ch. 122, Section 3; Shan., Section 124; mod. Code 1932, Section 141.)

§ 3-103. *Counties electing three representatives each.*—The following counties shall elect three (3) representatives each, to wit: Knox and Hamilton. (Acts 1901,

ch. 122, Section 4; Shan., Section 125; Code 1932, Section 142.)

§ 3-104. *Davidson County.*—Davidson county shall elect six (6) representatives. (Acts 1901, ch. 122, Section 5; Shan., Section 126; Code 1932, Section 143.)

§ 3-105. *Shelby County.*—Shelby county shall elect seven (7) representatives. (Acts 1901, ch. 122, section 6; Shan., section 126a1; Code 1932, section 144.)

§ 3-106. *Joint representatives.*—The following counties, jointly, shall elect one representative, as follows, to wit:

First district—Johnson and Carter.
Second district—Sullivan and Hawkins.
Third district—Washington, Greene and Unicoi.
Fourth district—Jefferson and Hamblen.
Fifth district—Hancock and Grainger.
Sixth district—Scott, Campbell and Union.
Seventh district—Anderson and Morgan.
Eight district—Knox and Loudon.
Ninth district—Polk and Bradley.
Tenth district—Meigs and Rhea.
Eleventh district—Cumberland, Bledsoe, Sequatchie, VanBuren and Grundy.
Twelfth district—Fentress, Pickett, Overton, Clay and Putnam.
Fourteenth district—Summer, Trousdale and Macon.
Fifteenth district—Davidson and Wilson.
Seventeenth district—Giles, Lewis, Maury and Wayne.
Eighteenth district—Williamson, Cheatham and Robertson.
Nineteenth district—Montgomery and Houston.
Twentieth district—Humphreys and Perry.
Twenty-first district—Benton and Decatur.
Twenty-second district—Henry, Weakley and Carroll.
Twenty-third district—Madison and Henderson.

Twenty-sixth district—Tipton and Lauderdale.
Twenty-seventh district—Shelby and Fayette (Acts 1901, ch. 122, section 7; 1907, ch. 178, sections 1, 2; 1915, ch. 145, sections 1, 2; Shan., section 127; Acts 1919, ch. 147, section 1; 1925 Private, ch. 472, section 2; Code 1932, section 145; Acts 1933, ch. 167, section 1; 1935, ch. 150, section 2; 1941, ch. 58, section 2; 1945, ch. 68, section 2; C. Supp. 1950, section 145.)

§ 3-107. *State senatorial districts.*—Until the next enumeration and apportionment of voters, the following counties shall comprise the senatorial districts, to wit:

First district—Johnson, Carter, Unicoi, Greene and Washington.
Second district—Sullivan and Hawkins.
Third district—Hancock, Morgan, Grainger, Claiborne, Union, Campbell, and Scott.
Fourth district—Cocke, Hamblen, Jefferson, Sevier, and Blount.
Fifth district—Knox.
Sixth district—Knox, Loudon, Anderson and Roane.
Seventh district—McMinn, Bradley, Monroe, and Polk.
Eighth district—Hamilton.
Ninth district—Rhea, Meigs, Bledsoe, Sequatchie, Van Buren, White and Cumberland.
Tenth district—Fentress, Pickett, Clay, Overton, Putnam, and Jackson.
Eleventh district—Marion, Franklin, Grundy, and Warren.
Twelfth district—Rutherford, Cannon, and DeKalb.
Thirteenth district—Wilson and Smith.
Fourteenth district—Sumner, Trousdale and Macon.
Fifteenth district—Montgomery and Robertson.
Sixteenth district—Davidson.

Seventeenth district—Davidson.
Eighteenth district—Bedford, Coffee, and Moore.
Nineteenth district—Lincoln and Marshall.
Twentieth district—Maury, Perry and Lewis.
Twenty-first district—Hickman, Williamson and Cheatham.
Twenty-second district—Giles, Lawrence and Wayne.
Twenty-third district—Dickson, Humphreys, Houston and Stewart.
Twenty-fourth district—Henry and Carroll.
Twenty-fifth district—Madison, Henderson and Chester.
Twenty-sixth district—Hardeman, McNairy, Hardin, Decatur and Benton.
Twenty-seventh district—Gibson.
Twenty-eight district—Lake, Obion, and Weakley.
Twenty-ninth district—Dyer, Lauderdale and Crockett.
Thirtieth district—Tipton and Shelby.
Thirty-first district—Haywood and Fayette.
Thirty-second district—Shelby.
Thirty-third district—Shelby. (Acts 1901, ch. 122, Section 1; 1907, ch. 3, Section 1; Shan., Section 128; Code 1932, Section 146; Acts 1945, ch. 11, Section 1; C. Supp. 1950, Section 146.)

APPENDIX B

Federal Statutes Involved

28 U.S.C. §1343:

"*Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. §1983:

"*Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988:

"*Proceeding in vindication of civil rights.* The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

DECLARATORY JUDGMENTS ACT

28 U.S.C. § 2201

"Creation of remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. § 2202

"Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

APPENDIX C

UNITED STATES CONSTITUTION, amend. XIV, §§ 1 and 2:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states, according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.